

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JOSE GUADALUPE PEREZ-FARIAS,)	NO. CV-05-3061-MWL
et al.,)	
)	ORDER GRANTING PLAINTIFF'S
Plaintiffs,)	MOTION FOR A PROTECTIVE ORDER
)	PROHIBITING DISCOVERY OF
vs.)	PLAINTIFFS' IMMIGRATION STATUS
)	
GLOBAL HORIZONS, INC.,)	
et al.,)	
)	
Defendants.)	
)	

Before the Court is Plaintiff's motion seeking a protective order prohibiting Defendants from inquiring into Plaintiffs' immigration status or eligibility for employment. (Ct. Rec. 41).

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs filed this class action on July 12, 2005, alleging they were denied or terminated from agricultural employment in 2004, because Defendants systematically and intentionally preferred H-2A laborers from Thailand, in violation of federal and state law. (Ct. Rec. 1). Plaintiffs seek declaratory and injunctive relief as well as damages. (Ct. Rec. 1).

On November 28, 2005, during the depositions of the Plaintiffs, an issue arose regarding inquiry into the immigration status of the Plaintiffs. The parties requested a telephonic

1 hearing with the Court, at which time Plaintiffs made an oral
2 motion for a protective order to prohibit Defendants from making
3 discovery requests regarding the immigration status of Plaintiffs.
4 (Ct. Rec. 41). The Court requested the parties proceed with the
5 depositions without inquiry regarding the immigration status of
6 the Plaintiffs, but specifically reserved ruling on this issue
7 pending briefing on the issue by both parties. Plaintiff filed a
8 memorandum in support of this motion on November 30, 2005. (Ct.
9 Rec. 37). Defendants filed a memorandum in opposition to
10 Plaintiff's motion for a protective order on December 7, 2005.
11 (Ct. Rec. 42). Plaintiff filed a reply memorandum on December 12,
12 2005. (Ct. Rec. 45).

13 **PLAINTIFFS' MOVING ARGUMENTS**

14 Plaintiffs contend that this Court should issue a protective
15 order prohibiting Defendants from using the discovery process to
16 inquire into Plaintiffs' immigration status or eligibility for
17 employment. (Ct. Rec. 37). Plaintiffs argue that inquiry into
18 their immigration status places an undue burden on the Plaintiffs,
19 that is outweighed by any interest asserted by Defendants, and is
20 irrelevant to a determination for class certifications matters.

21 Plaintiffs assert that their position on discovery in this
22 case is supported by the 2004 Ninth Circuit case *Rivera v. NIBCO,*
23 *Inc.*, 364 F.3d 1057 (9th Cir. 2004). In *Rivera*, the Ninth Circuit
24 held that a magistrate judge's grant of a protective order
25 prohibiting defendants from using the discovery process to inquire
26 into plaintiffs' immigration status was justified "because the
27 substantial and particularized harm of the discovery - the
28 chilling effect that the disclosure of plaintiffs' immigration

1 status could have upon their ability to effectuate their rights -
2 outweighed [defendants'] interests in obtaining the information."
3 *Rivera*, 364 F.3d at 1064. The Court found that "[t]he chilling
4 effect such discovery could have on the bringing of civil rights
5 actions unacceptably burdens the public interest." *Id.* at 1065.
6 Plaintiffs argue that the Court should reach a similar result
7 here.

8 Plaintiffs contend that, as in *Rivera*, the discovery
9 Defendants seek is at the beginning of the litigation process. In
10 addition, similarly, Defendants are unable to articulate any
11 interest in discovering the immigration status of Plaintiffs at
12 this stage in the litigation, as it is not relevant to class
13 certification issues. (Ct. Rec. 37, pp. 4-5).

14 **DEFENDANTS' OPPOSITION ARGUMENTS**

15 Defendants respond that they must be allowed to inquire into
16 the named Plaintiffs' eligibility to work and into the number of
17 members of the alleged subclasses who shared their work status,
18 whatever it may be. (Ct. Rec. 42, p. 2). They claim that
19 authorized and unauthorized workers present different legal
20 issues, where back pay is concerned, and no one individual can
21 represent a class consisting of both categories of workers on such
22 claims due to the typicality requirement of Fed. R. Civ. P.
23 23(a)(3). (Ct. Rec. 42, p. 2). Defendants assert that the
24 requested discovery relates directly to the proper definition of
25 any classes that should be certified on the back-pay claims, to
26 the named Plaintiffs' typicality as representatives of the classes
27 seeking relief, and to whether any of these classes are
28 sufficiently numerous. (*Id.*)

1 In support of their argument, Defendants rely on the 2002
2 United States Supreme Court case *Hoffman Plastic Compounds, Inc.*
3 *V. NLRB*, 535 U.S. 137 (2002) ("*Hoffman*"). *Hoffman* held that an
4 undocumented alien, who has never been legally authorized to work
5 in the United States, cannot be awarded back-pay for work that has
6 not been performed. *Hoffman*, 535 U.S. at 149-150. Accordingly,
7 Defendants argue that, on the back-pay claims, separate classes
8 are required for legal and illegal workers. (Ct. Rec. 42, p. 5).
9 They claim that, without discovery of the work-authorization
10 status of the named Plaintiffs, they would not know which group,
11 legal or illegal workers, they are entitled to represent. (*Id.*).

12 Defendants also distinguished the instant case from *Rivera*.
13 (Ct. Rec. 42, pp. 5-7). They contend that *Rivera* did not hold
14 that Defendants are **never** permitted discovery into immigration
15 status, only **early** discovery into immigration status in the
16 circumstances of that particular case. Defendants indicate that
17 Plaintiffs have suggested no good reason why discovery into
18 immigration status should be deferred until later (nor have they
19 indicated when they feel it would be appropriate). Defendants
20 also assert that in *Rivera* there was no claim of discriminatory
21 denial of employment as there is in this case. Finally,
22 Defendants indicate that *Rivera* was not a class action case and;
23 therefore, there was no questions presented as to how a class
24 should be defined, whether it was sufficiently numerous and
25 whether the named plaintiffs were typical of such a class.

26 Defendants assert that the problem, here, is that Plaintiffs
27 seek to represent a class consisting of both legal and illegal
28 workers. (Ct. Rec. 42, p. 9). They argue that, on the failure to

1 provide work and wrongful termination claims, each individual
2 Plaintiff can represent only one group or the other, and, without
3 discovery pertaining to immigration status, there would be no way
4 to tell which group they may represent. (Ct. Rec. 42, p. 9).
5 Thus, Defendants contend that such discovery is needed on the
6 class certification issue, as well as the merits of Plaintiffs'
7 claims.

8 **PLAINTIFFS' RESPONSE**

9 Plaintiffs respond arguing that Plaintiffs' immigration
10 status is not relevant to the determination of class certification
11 or liability for the federal and state law claims alleged. (Ct.
12 Rec. 45).

13 Plaintiffs contend that Defendants failed to present any
14 authority to support its contention that Plaintiffs may represent
15 a class consisting only of documented or undocumented workers, but
16 not both. (Ct. Rec. 45, p. 2). They assert that information
17 regarding Plaintiffs' immigration status is not necessary to
18 determine whether their claims are typical of the class they seek
19 to represent, whether they are adequate representatives, or to
20 assess whether the subclasses alleged will meet the numerosity
21 requirement. (Ct. Rec. 45, p. 5). As to typicality, Plaintiffs
22 allege that all representative Plaintiffs and class members,
23 whether documented or undocumented, suffered the same or similar
24 injury, arising from the same course of conduct by Defendants
25 (unlawfully denied employment or unlawfully terminated). (Ct.
26 Rec. 45, pp. 6-12). They indicate that, while the amount of
27 damages Plaintiffs and class members are entitled to may vary,
28 Plaintiffs' claims are still typical of the class members they

1 seek to represent. With regard to adequacy of representation,
2 Plaintiffs assert that the representative parties do not have
3 conflicts with other class members, and the possible creation of
4 potential conflicts by a court's determination on the appropriate
5 measure of damages, at a later point in the case, is not a basis
6 to deny certification. (Ct. Rec. 45, pp. 12-13). They argue that
7 the fact that some class members could be entitled to a greater
8 amount of damages based on their immigration status would not
9 create a conflict, and, even if such a conflict developed, the
10 Court could create additional subclasses. Regarding numerosity,
11 Plaintiffs assert that there is no conflict or other basis that
12 would require classes to be segregated based on immigration
13 status; thus, the numerosity requirement has been met. (Ct. Rec.
14 45, pp. 13-14).

15 Plaintiffs again argue that, consistent with *Rivera*, the
16 Court should not allow inquiry into Plaintiffs' immigration
17 status. (Ct. Rec. 45, pp. 14-19). Plaintiffs indicate that
18 further inquiry into Plaintiffs' and class members' immigration
19 status would only be appropriate when liability is established and
20 only if this Court subsequently determines that back-pay awards
21 should be limited based on immigration status (*Hoffman*). In that
22 case, Plaintiffs claim that the Court should still structure the
23 proceedings to minimize the disclosure by appointing a special
24 master or limiting the disclosure to only those class members
25 affirmatively seeking a back-pay remedy. (Ct. Rec. 45, pp. 15-
26 16).

27 ///

28 ///

1 Plaintiffs also argue that *Hoffman* does not make immigration
2 status an element of Plaintiffs' employment discrimination cause
3 of action. (Ct. Rec. 45, p. 16). As noted by Plaintiffs, to do
4 so would be inconsistent with the central purpose of federal
5 discrimination laws because, if Plaintiffs were required to
6 establish that they were authorized to work as an element of their
7 claim, only documented workers would be able to pursue employment
8 discrimination claims.

9 Plaintiffs argue that their immigration status is not
10 relevant to class certification issues; namely, typicality,
11 adequacy of representation, or numerosity. Since this Court has
12 narrowed the scope of current discovery to liability issues, not
13 damages, Plaintiffs assert that Defendants should be prohibited
14 from inquiring into Plaintiffs' immigration status or eligibility
15 for employment at this time.

16 DISCUSSION

17 Scope Of Discovery

18 The purpose of discovery is to make trial "less a game of
19 blind man's bluff and more a fair contest with the basic issues
20 and facts disclosed to the fullest practicable extent possible,"
21 *United States v. Procter & Gamble*, 356 U.S. 677, 683, 78 S.Ct.
22 983, 987 (1958), and to narrow and clarify the issues in dispute,
23 *Hickman v. Taylor*, 329 U.S. 495, 501, 67 S.Ct. 385, 388 (1947).

24 Fed. R. Civ. P. 26(b) establishes the scope of discovery and
25 states in pertinent part:

26 Parties may obtain discovery regarding any matter, not
27 privileged, that is relevant to the claim or defense of
28 any party, including the existence, description, nature,
custody, condition, and location of any books, documents,
or other tangible things and the identity and location of
persons having knowledge of any discoverable matter. For

1 good cause, the court may order discovery of any matter
2 relevant to the subject matter involved in the action.
3 Relevant information need not be admissible at trial if
the discovery appears reasonably calculated to lead to the
discovery of admissible evidence.

4 "The party who resists discovery has the burden to show that
5 discovery should not be allowed, and has the burden of clarifying,
6 explaining, and supporting its objections." *Oakes v. Halvorsen*
7 *Marine Ltd.*, 179 F.R.D 281, 283 (C.D. Cal. 1998); *Nestle Foods*
8 *Corp. v. Aetna Casualty & Surety Co.*, 135 F.R.D. 101, 104 (D. N.J.
9 1990).

10 Protective Orders

11 For "good cause shown," a court may issue a protective order
12 that "discovery may be had only on specified terms and
13 conditions." Fed. R. Civ. P. 26(c)(2). Fed. R. Civ. P. 26(c) is
14 a safeguard to protect parties and witnesses in view of Fed. R.
15 Civ. P. 26(b)'s broad discovery rights. *United States v. Columbia*
16 *Broadcasting System, Inc.*, 666 F.2d 364, 368-369 (9th Cir. 1982).
17 Under Fed. R. Civ. P. 26(c), this Court may issue protective
18 orders for persons subject to a subpoena and "for good cause shown
19 . . . may make any order which justice requires to protect a party
20 or person from annoyance, embarrassment, oppression, or undue
21 burden or expense," including:

- 22 1. Prohibiting disclosure or discovery;
- 23 2. Conditioning disclosure or discovery on specified terms;
- 24 3. Preventing inquiring into certain matters; or
- 25 4. Limiting the scope of disclosure or discovery to certain
26 matters.

27 To obtain a protective order, the party resisting discovery
28 or seeking limitations must show "good cause" for its issuance.

1 Fed. R. Civ. P. 26(c); *Jepson, Inc. v. Makita Elec. Works, Ltd*,
2 30 F.3d 854, 858 (7th Cir. 1994). Generally, a party seeking a
3 protective order has a "heavy burden" to show why discovery should
4 be denied and a strong showing is required before a party will be
5 denied the right to take a deposition. *Blankenship v. Hearst*
6 *Corp.*, 519 F.2d 418, 429 (9th Cir. 1975). "If the motion for
7 protective order is denied in whole or in part, the court may, on
8 such terms and conditions as are just, order that any party or
9 other person provide or permit discovery." Fed. R. Civ. P.
10 26(c).

11 Analysis

12 Plaintiffs' position on discovery in this case is supported
13 by *Rivera*. As noted above, in *Rivera*, the Ninth Circuit held that
14 a magistrate judge's protective order prohibiting defendants from
15 using the discovery process to inquire into plaintiffs'
16 immigration status was justified "because the substantial and
17 particularized harm of the discovery - the chilling effect that
18 the disclosure of plaintiffs' immigration status could have upon
19 their ability to effectuate their rights - outweighed
20 [defendants'] interests in obtaining the information." *Rivera*,
21 364 F.3d at 1064. That same harm or chilling effect is apparent
22 in the case at hand. As in *Rivera*, undocumented workers would be
23 deterred from bringing suit out of fear of deportation or criminal
24 prosecution, and documented workers may be chilled by fear that
25 their immigration status would be changed or that their status
26 would reveal the immigration problems of their family or friends.
27 *Rivera*, 364 F.3d at 1065.

28 ///

1 Moreover, this Court has narrowed the scope of current
2 discovery to issues regarding liability, not damages. (Ct. Rec.
3 36). The Court agrees with Plaintiffs that further inquiry into
4 Plaintiffs' and class members' immigration status would only be
5 appropriate if liability is established and only in regards to
6 claims for damages related to back-pay. *See, Hoffman*, 535 U.S. at
7 137.

8 As Defendants argue, *Hoffman* stands for the proposition that
9 an undocumented alien, who has never been legally authorized to
10 work in the United States, cannot be awarded back-pay for work
11 that has not been performed. *Hoffman*, 535 U.S. at 149-150.
12 Accordingly, Defendants argue that, on the back-pay claims,
13 separate classes are required for legal and illegal workers. (Ct.
14 Rec. 42, p. 5). They claim that, without discovery of the work-
15 authorization status of the named Plaintiffs, they would not know
16 which group, legal or illegal workers, they are entitled to
17 represent. (Ct. Rec. 42, p. 5).

18 However, as noted by Plaintiffs, *Hoffman* does not make
19 immigration status an element of Plaintiffs' employment
20 discrimination cause of action because to do so would be
21 inconsistent with the central purpose of federal discrimination
22 laws. (Ct. Rec. 45, p. 16). If Plaintiffs were required to
23 establish that they were authorized to work as an element of their
24 claim, only documented workers would be able to pursue employment
25 discrimination claims.

26 Plaintiffs' immigration status is additionally not relevant
27 to class certification issues; namely, typicality, adequacy of
28 representation, or numerosity. As to typicality, Plaintiffs

1 allege that all representative Plaintiffs and class members,
2 whether documented or undocumented, suffered the same or similar
3 injury, arising from the same course of conduct by Defendants
4 (unlawfully denied employment or unlawfully terminated). (Ct.
5 Rec. 45, pp. 6-12). They indicate that, while the amount of
6 damages Plaintiffs and class members are entitled to may vary,
7 Plaintiffs' claims are still typical of the class members they
8 seek to represent. With regard to adequacy of representation,
9 Plaintiffs assert that the representative parties do not have
10 conflicts with other class members. (Ct. Rec. 45, pp. 12-13).
11 They argue that the fact that some class members could be entitled
12 to a greater amount of damages based on their immigration status
13 would not create a conflict, and, even if such a conflict
14 developed, the Court could create additional subclasses at that
15 later time. Regarding numerosity, Plaintiffs assert that there is
16 no conflict or other basis that would require classes to be
17 segregated based on immigration status; thus, the numerosity
18 requirement has also been met. (Ct. Rec. 45, pp. 13-14).

19 Without specifically addressing these issues as they pertain
20 to class certification, case law does indicate that whether a
21 plaintiff will be successful in proving damages is immaterial at
22 this stage of the proceeding and the matter should be evaluated
23 only in terms of Plaintiffs' claims as to liability. See,
24 *Kornberg v. Carnival Cruise Lines, Inc.*, 741 F.2d 1332, 1337 (11th
25 Cir. 1984); *Quellette v. International Paper Co.*, 86 F.R.D. 476,
26 480 (D. Vt. 1980); *Sanders v. Faraday Laboratories, Inc.*, 82
27 F.R.D. 99, 101 (E.D. N.Y. 1979). Therefore, it appears to this
28 Court that an inquiry into Plaintiffs' immigration status for

1 purposes of class certification is immaterial and unnecessary.
2 *Id.*

3 Plaintiffs, as the party seeking to obtain the protective
4 order, must show "good cause" for its issuance. Fed. R. Civ. P.
5 26(c); *Jepson*, 30 F.3d at 858. As the party seeking the
6 protective order, Plaintiffs have a "heavy burden" to show why
7 discovery should be limited, and a strong showing is required
8 before the Court will deny Defendants' privilege to inquire into
9 Plaintiffs' immigration status. *Blankenship*, 519 F.2d at 429.
10 For good cause shown, this Court may issue a protective order to
11 protect a party from annoyance, embarrassment, oppression, or
12 undue burden or expense. Fed. R. Civ. P. 26(c).

13 At this stage in the case, where discovery has been limited
14 to issues regarding only liability, Plaintiffs have satisfied
15 their burden and have displayed good cause for the issuance of a
16 protective order to prohibit Defendants from inquiring into
17 Plaintiffs' immigration status or eligibility for employment.
18 However, this issue may be revisited at a later date when the
19 scope of discovery is broadened to include issues as to damages.

20 CONCLUSION

21 Based on the foregoing, the Court **GRANTS** Plaintiffs' motion
22 for a protective order prohibiting Defendants from inquiring into
23 Plaintiffs' immigration status or eligibility for employment at
24 this stage in the discovery process. (**Ct. Rec. 41**).

25 If it appears at some later juncture that such discovery
26 would be relevant, and more relevant than harmful, Defendants may
27 seek leave to discover information relating to Plaintiffs'
28 immigration status at that time.

1 The District Court Executive is directed to enter this order
2 and forward copies to counsel for Plaintiffs and Defendants.

3 IT IS SO ORDERED.

4 DATED this 4th day of January, 2006.
5

6
7 S/ Michael W. Leavitt
8 MICHAEL W. LEAVITT
9 UNITED STATES MAGISTRATE JUDGE
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28